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No. 119, Original

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

STATE OF CONNECTICUT, *et al.*,

Plaintiffs,

v.

STATE OF NEW HAMPSHIRE,

Defendant.

RESPONSE BY THE STATE OF NEW HAMPSHIRE TO THE MOTION OF THE CONNECTICUT OFFICE OF CONSUMER COUNSEL FOR LEAVE TO INTERVENE AND FOR LEAVE TO FILE A COMPLAINT

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April 9, 1992

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STATE OF CONNECTICUT,
COMMONWEALTH OF MASSACHUSETTS,
STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATION,

Plaintiffs,

v.

STATE OF NEW HAMPSHIRE,

Defendant.

RESPONSE BY THE STATE OF NEW HAMPSHIRE TO THE MOTION OF THE CONNECTICUT OFFICE OF CONSUMER COUNSEL FOR LEAVE TO INTERVENE AND FOR LEAVE TO FILE A COMPLAINT

Pursuant to Rule 21.4 of the Rules of the United States Supreme Court, the State of New Hampshire, by its attorneys, opposes the Motion of the Connecticut Office of Consumer Counsel for Leave to Intervene and for Leave to File a Complaint in this action. The motion should be denied because the proposed intervenors do not satisfy the standards for intervention in an original action brought by states in their *parens patriae* capacities. Whatever interest the citizens of Connecticut may have in this challenge to the Nuclear Property Tax paid by the owners of Seabrook is already represented by the State of Connecticut. Intervention by the Connecticut Office of Consumer Counsel would result in the type of duplicative representation this Court has heretofore declined to permit.

There is No Compelling Interest Justifying Intervention

Ordinary standards for intervention do not apply to cases invoking the original jurisdiction of this Court by states in their role as *parens patriae*. The need for a particularly restrictive approach toward intervention to *parens patriae* cases has been clear since this Court's decision in *New Jersey v. New York*, 345 U.S. 369 (1953). There the Court denied the City of Philadelphia's motion to intervene to assert its interest in a dispute over distribution of water from the Delaware River. The State of Pennsylvania was already a party to the case in its *parens patriae* capacity. In denying intervention, the Court stated:

> **An intervenor whose state is already a party should have the burden of showing some compelling interest in his own right apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state.**

345 U.S. at 373.

The restrictive intervention test established in *New Jersey* continues as a sound and practical limitation on the number of parties who may speak for the interests of citizens of a state. The rule was cited with approval in *United States v. Nevada*, 412 U.S. 534 (1973) - another water rights dispute - in which the Court noted that individual users of water "ordinarily would have no right to intervene in an original action in this Court."

The District of Columbia Circuit described the reasons for imposing more restrictive intervention requirements in cases of this type in *Environmental Defense Fund, Inc. v. Higginson*, 631 F.2d 738 (D.C. Cir. 1979). There the court noted that, in original jurisdiction cases,

> **the Supreme Court has held . . . that the test for intervention becomes more stringent when the applicant for intervention is a subdivision or citizen of a state and the state is already a party to the suit.**

631 F.2d at 739.

The Court referred to the strong interests in restricting intervention in original jurisdiction cases "so as to prevent those cases from becoming time-consuming, multi-party litigation." 631 F.2d at 740.

The rigorous test for intervention in an original *parens patriae* case in this Court bars the Connecticut Office of Consumer Counsel from intervening in this case.

The Intervenor's Effort to Distinguish the New Jersey Case is Unavailing

The Connecticut Office of Consumer Counsel acknowledges the "compelling interest" test of *New Jersey v. New York*, 345 U.S. 369 (1953), but seeks to avoid it on the ground that, in *New Jersey*, there was no showing of a prior "divergent interest" between the State of Pennsylvania and the City of Philadelphia with regard to the matter at hand. Intervenor's Brief at 12. The Connecticut Office of Consumer Counsel argues that, in contrast, its interests and those of the Connecticut Attorney General are and have been divergent.

The effort to distinguish *New Jersey* fails for two reasons. First, contrary to the suggestion of the Connecticut Office of Consumer Counsel, the City of Philadelphia clearly had interests which diverged from those of the State of Pennsylvania and the Supreme Court acknowledged that divergence.

The City of Philadelphia represents only a part of the citizens of Pennsylvania who reside in the watershed area of the Deleware River and its tributaries and depend upon those waters.

345 U.S. at 373.

The Court assumed the existence of numerous divergent interests within the state, but declined "to evaluate all the separate interests within Pennsylvania" while seeking to resolve a controversy between states.

Second, whatever divergence of interests may exist between the Connecticut Attorney General and the Office of Consumer Counsel is irrelevant because, with respect to the only issue that will be decided in this case, there is no divergence. The issue raised by Plaintiffs Connecticut, Massachusetts and Rhode Island is the constitutionality of New Hampshire's Nuclear Property Tax. The Connecticut Office of Consumer Counsel proposes to adopt the pleading already filed by the Plaintiffs. It would contend that the Nuclear Property Tax is unconstitutional for the same reasons that the State of Connecticut and the other Plaintiffs contend that it is. The interests of the State of Connecticut and the Connecticut Office of Consumer Counsel with respect to that issue are identical. They do not need separate representation.

The "compelling" divergent interest alleged by the Connecticut Office of Consumer Counsel to justify intervention, in fact, concerns an issue that is not raised in this case. That issue is whether, if the Nuclear Property Tax is upheld, the Connecticut Department of Public Utility Control should permit the Nuclear Property Tax to be "passed through" to Connecticut consumers of electricity through increased rates. This is an issue that will be resolved at the State level in a separate rate proceeding in which the Office of Consumer Counsel will have an opportunity to express its views in opposition to such pass through. This Court will not be resolving local ratemaking questions and no such issues have been raised in the states' pleadings.[1]

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[1] To the extent that ratemaking questions have anything to do with this case, they relate to the propriety of this Court exercising original jurisdiction in the first place. This is because the standing of the Plaintiff states to maintain this action as *parens patriae* depends upon their assumption that the Nuclear Property Tax will be "passed through" to consumers in the form of higher rates. The Connecticut Office of Consumer Counsel asserts that the tax has not been passed through to Connecticut consumers and that the Consumer Counsel will vigorously oppose any such pass through before the appropriate Connecticut regulatory authority. If the Consumer Counsel's position prevails, the basis on which the State of Connecticut has sought to have this Court exercise its original jurisdiction will evaporate. Thus, instead of justifying intervention, the Consumer Counsel's motion provides further support for the view, previously expressed by New Hampshire in its Opposition to Plaintiffs' Motion for Leave to File the Complaint, that this is an inappropriate case for the exercise of the Court's original jurisdiction.

Conclusion

For these reasons, the State of New Hampshire respectfully requests that the Motion of the Connecticut Office of Consumer Counsel for Leave to Intervene and for Leave to File a Complaint in this case be denied.

Respectfully submitted,

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